IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 15, 2010

STATE OF TENNESSEE EX REL. KELLY DEBUSK v. ALAN DEBUSK

Appeal from the General Sessions Court for Blount County
No. S-12363 David R. Duggan, Judge

No. E2008-01659-COA-R3-CV - FILED FEBRUARY 16, 2010

Kelly DeBusk ("Mother") and Alan DeBusk ("Father") were divorced in November of 2007. The State of Tennessee ("the State") was granted leave to intervene in post-divorce matters involving child support, among other things, because Mother and Father's minor children had been enrolled in TennCare. Father filed a motion to reconsider or modify child support and, after a hearing, the Trial Court granted Father a credit against his child support payments for mortgage payments and other property related payments. The State appeals to this Court alleging that allowing the credits against child support was improper. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; and Warren Jasper, Senior Counsel for the appellant, the State of Tennessee *ex rel.* Kelly DeBusk.

OPINION

Background

The record before us on appeal can be described, at most, as sparse. It contains neither the order of the Trial Court which granted Mother and Father a divorce nor the order whereby Father's child support obligation originally was set. The State concedes in its brief on appeal, however, that the original child support order was "entered in accordance with the Guidelines."

As best as we can tell from the record on appeal, Father filed a motion to reconsider or modify with regard to his child support obligation. Although the record does not contain a copy of Father's motion, the Trial Court's April 3, 2008 order states that the Trial Court was considering, among other things, Father's motion to reconsider and modify. In response to this motion, the Trial Court's April 3, 2008 order provides that Father:

> shall receive credit against both child support and alimony for one-half (½) of the documented monthly mortgage payments paid by him on the parties' tracts of real property, documented payment of premiums for insurance upon said properties, documented payment of taxes upon said properties, and the documented reasonable cost of necessary repairs or maintenance upon said properties as of December 1, 2007….

The State filed a motion asking the Trial Court to reconsider its April 3, 2008 order alleging, in part, that the real property obligations for which Father was allowed a credit did not qualify as necessities as defined in *Peychek v. Rutherford*, No. W2003-01805-COA-R3-JV, 2004 WL 1269313 (Tenn. Ct. App. June 8, 2004), *no appl. perm. appeal filed*. After a hearing on the State's motion to reconsider, the Trial Court entered an order on July 31, 2008 finding and holding, *inter alia*:

> 2. That "there is no question the *Peychek* case stands for the proposition that the parties cannot agree there will not be any child support. There is no question that is the law."
> 3. That "*Peychek* stands for the proposition that credits are allowed. *Peychek* says right on its face that if the credits are proper, that is child support."
> 4. That one-half of the mortgage payments on tracts of property, one-half of the insurance premiums, and one-half of the costs of any necessary costs of repairs and expenses are necessaries as defined in the *Peychek*

case and [Father] shall be given credit toward his child support obligation for those expenditures.

The State appeals the Trial Court's July 31, 2008 order to this Court.[1]

Discussion

Although not stated exactly as such, the State raises one issue on appeal: whether the Trial Court erred in allowing Father credit toward his child support obligation for payments related to real property.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Peychek*, this Court explained:

> [I]t is well settled that non-custodial parents may be given credit against their child support obligation for payments made on behalf of their children if such payments are for necessaries that the custodial parent either failed to provide or refused to provide. *Brownyard v. Brownyard*, 1999 WL 418352 (Tenn. Ct. App. June 22, 1999); *Hartley v. Thompson*, 1995 WL 296202 (Tenn. Ct. App. May 17, 1995); *Oliver v. Oczkowicz*, 1990 WL 64534 (Tenn. Ct. App. May 18, 1990). However, the credit for necessaries cannot exceed the amount of support due for the period during which the necessaries were furnished. W. Walton Garrett, *Divorce, Alimony and Child Custody* § 14-8(8) (2001). The obligation to provide necessaries requires the provision of appropriate food, shelter, tuition, medical care, legal services, and funeral expenses as are needed. What items are appropriate and needed depends on the parent's ability to provide and this issue is to be determined by the trier of fact. *Id*. at § 2-3(3).
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> In order to maintain a successful claim for necessaries, the plaintiff must prove: (1) that the child needed the particular goods or services that were

[1]Neither Father nor Mother filed a brief with this Court.

> provided, (2) that the defendant had a legal obligation to provide the goods or services, (3) that the defendant failed to provide the goods or services, and (4) the actual cost of these goods or services. *Hooper v. Moser*, 2003 WL 22401283, at *3 (Tenn. Ct. App. Oct. 22, 2003).

Peychek, 2004 WL 1269313, at *4.

The State's brief on appeal argues, in part, that "[t]he trial court erred by allowing the parents in this IV-D child support matter to agree to a cancellation of lawful child support," and that "agreements incorporated into decrees which purport to relieve a parent of his or her child support obligation are void as against public policy."

While we agree with the State that this Court has specifically stated that "[a]greements incorporated into decrees which purport to relieve a parent of his or her child support obligation are void as against public policy," we disagree with the State that this is the situation in the case now before us on appeal. *State ex rel. Wrzesneiwski v. Miller*, 77 S.W.3d 195, 197 (Tenn. Ct. App. 2001). The record on appeal reveals that Mother and Father did not agree to a cancellation of lawful child support, and the Trial Court did not allow such a void agreement. Instead, the Trial Court granted Father credits toward his child support obligation under *Peychek*.

The State then argues that Father did not make the required showing under *Peychek* because "[a]t the hearing where *Peycheck* [sic] was considered, there was no testimony, whatsoever, from the parties satisfying the requirements under *Peychek*, only argument of counsel." The best we can tell, the hearing to which the State refers was the hearing on the State's motion to reconsider the Trial Court's April 3, 2008 order, which is the order that originally granted Father the credits at issue in this appeal. The record on appeal contains no transcript from the hearing which led to the entry of the April 3, 2008 order. The record contains nothing showing what evidence may have been presented to the Trial Court with regard to this issue.

It appears from the Trial Court's April 3, 2008 order, however, that evidence was presented to the Trial Court on this issue as the Trial Court specifically stated in the April 3, 2008 order that monthly mortgage payments made by Father, the premiums for insurance upon the properties, the taxes upon the properties, and the reasonable cost of necessary repairs or maintenance all had been documented and, therefore, proven to the Trial Court. Thus, it appears that the Trial Court did receive evidence, in some manner at some time, before making its findings pursuant to *Peychek*. Further, we note, as best as we can tell from the record on appeal, that the Trial Court earlier had heard the issues, including presentation of evidence on those issues, that arose during the pendency of Mother's and

Father's divorce. This is apparent from the Trial Court's comments found in the transcript of the hearing on the State's motion to reconsider as these comments show that the Trial Court was well versed in the facts of this case.

As we have stated many times, "[t]his court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). The Trial Court recognized the *Peychek* requirements necessary to support a finding that the payments made by Father constituted necessaries sufficient to allow for credits against child support, and made specific findings under this standard. Given the record now before us on appeal, we cannot say that the evidence preponderates against these findings. As such, we affirm the Trial Court's July 31, 2008 order.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, the State of Tennessee *ex rel.* Kelly DeBusk.

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D. MICHAEL SWINEY, JUDGE